IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 85 of 1990

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AJAMBHAI ABDULKARIM & 1 - Appellant(s)
Versus
KESHAVLAL DAHYABHAI PARMAR - Defendant(s)

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Appearance :
MR MEHUL S SHAH for Appellant(s) : 1 - 2.MR SURESH M SHAH for Appellant(s) : 1 - 2.
MR DM THAKKAR for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 14/12/2006

ORAL JUDGMENT

1. Mr.Mehul S. Shah, learned counsel for the appellant and Mr.D.M. Thakkar, learned counsel for the respondents.

2. Heard.

3. The appeal has been admitted for hearing the parties on the following substantial questions of law;

   (i) Whether in the facts and circumstances of the case, the document Exh.45 can be considered to be a deed of mortgage by conditional sale or a pure sale-deed?

   (ii) Whether the Lower Court has erred in finding the suit transaction to be an out and out sale transaction?

   (iii) Whether the suit is maintainable?

4. During the course of the arguments, Mr.Shah, learned counsel for the appellants submitted that from the said document Exh.45 it would clearly appear that the possession was to be retained by the appellants and they were required to pay some amount, though according to the appellants, it was termed as rent, but it was in fact, interest and as right from the date of the document, the appellants are in possession of the property, the defendant cannot dispossess the appellants, except in accordance with law or without following due process of

law.

5. Taking into consideration the said arguments, I frame the following additional question of law;

(iv)Whether on the facts and in the circumstances of the case, the appellants are entitled to an order of injunction restraining the defendant – respondent from interfering with his possession or dispossessing them, except in accordance with law?

6. Notice of the question is given to Mr.Thakkar, learned counsel for the respondent – defendant.
7. The parties are heard.
8. The plaintiffs had filed the suit submitting inter-alia that the suit document Exh.45 which though appears to be a sale deed with a condition of repurchase in favour of the appellants, but, in fact, is a mortgage document and the sale deed is a conditional sale by mortgage. According to him, Exh.45 was executed somewhere in January, 1976. The plaintiffs had filed the suit for a declaration that the document of sale (Exh.45) be declared to be a mortgage deed and the defendant be restrained from dispossessing the plaintiffs. The respondent – defendant appeared

before the trial court and submitted that the suit of the plaintiffs was not maintainable and as the plaintiffs were not in possession of the property, no injunction could be granted in their favour. After recording the evidence and hearing the parties, the learned trial court decreed the suit, but on appeal, the said judgment and decree were set aside, therefore, the plaintiffs have filed the present appeal.

9. A suit for declaration would always be maintainable in a Court of law, if a consequential relief is not required in the facts and circumstances of the case. In the present matter, the plaintiffs did not seek consequential relief for redemption but they were contending before the court that the document in dispute is a mortgage deed. Assuming the court had declared that it was a mortgage deed, the plaintiffs would not have been entitled to file a subsequent suit, because of the bar contained in Order II Rule 2 of the Code of Civil Procedure. I go to a greater extent of assumption in favour of the plaintiffs and presume that such a suit would be maintainable and the plaintiffs were entitled to get such a declaration. In such a case, if such a declaration is granted in favour of the plaintiffs, then the plaintiffs would be required to exercise

their right and authority within 30 years from the date of the execution of the document and a suit for redemption could be filed within 30 years from the date time for redemption expires. In a case like present, where without a consequential relief, a declaration would be incompetent and insufficient, such a suit for declaration would not be maintainable. The learned court below was justified in holding that the suit for a declaration was not maintainable.

10. The question No.(iii) is to be answered against the interest of the plaintiffs holding that the suit was not maintainable for such a declaration.

11. As the suit for declaration would not be maintainable, it would not be necessary for this Court to enter into the controversy that whether the document was outright sale document or was a mortgage document.

12. So far as the question No.(iii) is concerned, it has to be held that the suit for declaration was not maintainable, but a suit for injunction would certainly be maintainable. A person in settled possession can always come to the Court and submit that he has an apprehension of his dispossession by some one or under the hands of the true owner, therefore, his possession be protected. The law is

well settled that a rank trespasser in settled possession cannot be dispossessed by the true owner. In the present case, the submission of the learned counsel for the respondent was that the plaintiffs have failed in proving that they apprehend danger or any injury. This Court required the learned counsel for the respondent to make a statement at the Bar that the respondent would not dispossess the plaintiffs – appellants, except in accordance with law, learned counsel for the respondent was not ready to make such statement.

13. It was next contended by the learned counsel for the respondent that the defendant had denied the plea of the plaintiffs that the plaintiffs were in possession of the property. From the records, it does not appear that on what particular date, the defendant had dispossessed the plaintiffs, because from the document in dispute (Exh.45), it clearly appears that the plaintiffs were to remain in possession on payment of some amount. If the defendant relies upon the said document, then he would be bound by the whole document, unless he proves that part of the document would not bind him for a particular reason. It is not the case of the defendant that subsequent to the execution of document Exh.45, the

defendant dispossessed the plaintiff or has entered into possession. Taking into consideration, the totality of the circumstances, recital in the document and the pleadings of the parties, including the finding of the first appellate court that the plaintiffs are in possession, I hold that the plaintiffs are entitled to an injunction against the defendant and the defendant is required to be restrained from dispossessing the plaintiff, except in accordance with law or by taking some steps known to law.

14. Question No.(iv) is answered in favour of the appellants. The appeal is partly allowed. It is held that the suit of the plaintiffs for a declaration simpliciter was not maintainable, but, however, the defendant is restrained from dispossessing the plaintiffs, except in accordance with law. The appeal to the extent indicated hereinabove, is allowed. No costs.

15. A decree be framed accordingly.

(R.S. GARG, J.)

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